The Court clearly stated the whole argument in *Craker* v. *Chicago, etc., R. Co.*[15]

> "In actions of tort, as a rule, when plaintiff's right to recover is established, he is entitled to full *compensatory* damages. * * * And for that he is entitled to full *compensation, malice or no malice.* * * * In actions for personal tort, mental suffering, vexation, and anxiety are subjects of *compensation in damages.* * * * And we must hold that all mental suffering directly consequent upon tort, * * * is ground for *compensatory* damages in action for tort." (Italics ours.)

H. F. W.

WHEN MAY GARAGES BE ERECTED IN RESIDENTIAL DISTRICTS. —Where a municipal ordinance is adopted under a general welfare clause, but the method of exercising the power is left to the discretion of the city council, it is an established principle that the power must be exercised in a reasonable manner.[1] Municipal ordinances regulating garages within city limits appear to have been uniformly upheld as a proper exercise of the police power.[2]

Around those ordinances which make the erection of buildings such as garages depend in some measure upon the consent of adjoining property owners the cases are in hopeless conflict. Missouri held in *State* v. *Beattie*,[3] where the opinion was written by the dissenting judge with strong reasons for his dissent, that an ordinance prohibiting the location of a livery stable on any block in St. Louis without the written consent of one half of the owners of the ground of the block was valid, but nine years later expressly overruled this decision,[4] and since then has consistently viewed such legislation as delegated, unreasonable and hence void.[5] Illinois, on the other hand, in an early case [6] held that an ordinance which prohibited the erection of a livery stable, gas house, etc., within 200 feet of any block two thirds of which was devoted to residences, without the written consent of the majority of adjoining property owners, was valid and not a delegation of legislative power. This case has been followed by two cases involving the

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[15] *Supra*, note 4.

[1] 2 Dillon Munic. Corp. § 589.

[2] People *v.* Village of Oak Park, 266 Ill. 365, 107 N. E. 636 (1914); People *ex rel.* Buscking *v.* Ericsson, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D, 607, Ann. Cas. 1915C, 183 (1914); *In Re* McIntosh, 211 N. Y. 265, 105 N. E. 414, L. R. A. 1915D, 603 (1914); Myers *v.* Fortunato (Del.), 110 Atl. 847 (1920).

[3] 16 Mo. App. 131 (1884).

[4] St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721 (1893).

[5] Hays *v.* City of Poplar Bluff, 263 Mo. 516, 173 S. W. 676, L. R. A. 1915D, 595 (1915).

[6] Chicago *v.* Stratton, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325 (1896).

erection of garages under similar requirements, and the same conclusion has been reached by the court.[7]

A queer situation exists in Delaware, where in *Dangel* v. *Williams*,[8] an ordinance providing that no public garage could be erected in the residential portion of the city within 40 feet of the building line of adjoining proprietors without their written consent filed with the building inspector, was held a delegation of legislative power. The Missouri decisions were expressly approved and the Illinois doctrine repudiated. Four years later, without mentioning this case and on identically the same facts, the opposite view was adopted, and Delaware was in line with Illinois.[9]

Nebraska, Wisconsin, Kentucky and Kansas [10] seem in line with Missouri, while Delaware, District of Columbia and Texas [11] follow Illinois. The United States Supreme Court in *Cusack Co.* v. *City of Chicago*,[12] held that an ordinance prohibiting the erection of a billboard in certain territory without the previous consent of the owners of adjoining property was not a delegation of legislative power and was hence valid.

Passing from this hopeless conflict to individual cases involving municipal ordinances, it was held in *Smith* v. *Hosford*,[13] that an ordinance under the general welfare clause prohibiting a clerk of a first class city from issuing a building permit for a garage without the approval of the application by the board of commissioners was void as being "a transgression on the rights of citizens and an infringement upon the constitutional safeguards by which they are protected". An ordinance providing that no garage permit allowing the storing of volatile inflammable oil should be issued for any building situated within 50 feet of any school, theater, place of assembly or tenement has been held valid as a municipal fire regulation.[14]

In *Storer* v. *Downey*,[15] an ordinance providing that "No building shall be erected or converted to use as a garage unless authorised by the board of aldermen" was held a valid exercise of the police power. In New York, an ordinance prohibiting the

[7] People *v.* Village of Oak Park, *supra;* People ex rel. Busching *v.* Ericsson, *supra.*

[8] 11 Del. Ch. 213, 99 Atl. 84 (1916).

[9] Myers *v.* Fortunato, *supra.*

[10] State *ex rel.* Omaha Gas Co. *v.* Withnell, 78 Neb. 33, 8 L. R. A. (N. S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680 (1907); State *ex rel.* Nehrbass *v.* Harper, 162 Wis. 589, 156 N. W. 941 (1916); Tilford *v.* Belknap, 126 Ky. 244, 11 L. R. A. (N. S.) 708, 103 S. W. 289 (1907); State *v.* Crawford, 104 Kan. 141, 177 Pac. 360, 2 A. L. R. 880 (1919).

[11] Myers *v.* Fortunato, *supra;* Weeks *v.* Heurich, 40 App. Cas. (D. C.) 46, Ann. Cas. 1914A, 972 (1913); Spann *v.* Dallas (Tex.), 189 S. W. 999 (1916).

[12] 242 U. S. 526, 37 Sup. Ct. 190, Ann. Cas. 1917C, 594, 61 L. Ed. 472, L. R. A. 1918A, 136 (1917).

[13] (Kan.), 187 Pac. 685 (1920).

[14] *In Re* McIntosh, 211 N. Y. 265, 105 N. E. 414, L. R. A. 1915D, 602 (1914).

[15] 215 Mass. 273, 102 N. E. 321 (1913).

conducting of a public garage for "storing, maintenance, keeping, caring for or repairing of automobiles or motors" was held not to prohibit the erection of a building which although adapted to such use could be used otherwise.[16]

In *People* v. *Ericsson, supra,* the rule is laid down as follows:

> "The power of the Legislature to regulate such a business is in no way dependent upon the question whether it is a nuisance per se. It is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions, and it is clearly within the province of the Legislature, in the exercise of police power, to authorize the municipalities of the state to direct the location of public garages."

This seems to be a good rule and is followed very consistently.

The general view that courts take with regard to garages may be better understood by giving a few examples of injunctions granted to prevent the erection of garages. In *Prendergast* v. *Walls,*[17] an injunction was granted to restrain the erection of a garage in the center of an exclusively residential district in close proximity to several churches and a parochial school, on the grounds that "the maintenance of a public garage at the southwest corner * * * will be a nuisance, distinctly prejudicial to the welfare, comfort, safety and peace of the persons residing in the immediate vicinity, to those attending school and to those worshipping in the said churches".

A distinction is drawn between a garage and a filling station; and an injunction on practically a similar state of facts was denied, in *City of Electra* v. *Cross,*[18] where a filling station was being erected at the intersection of the most populous streets of the city. In line with this distinction an ordinance prohibiting the erection of a filling station between certain streets in the most exclusive part of a city was held void as arbitrary and unreasonable.[19] The erection of a public garage may possibly have caused a different decision, the dissenting opinion in the case being very strong. One more impression of the general viewpoint of the courts may be obtained from the fact that a restriction against using property "for any offensive purpose or occupation" has been held to include a public garage.[20]

J. A.

INTERVENING IMPOSSIBILITY OF PERFORMANCE AS A DEFENSE FOR BREACH OF CONTRACT.—As a general principle, it has often been stated that the intervening impossibility of performance of a

[16] People *v.* Stroebel, 209 N. Y. 434, 103 N. E. 735 (1913).
[17] (Pa.), 101 Atl. 826 (1917).
[18] (Tex.), 225 S. W. 795 (1920).
[19] Standard Oil Co. *v.* City of Kearney (Neb.), 184 N. W. 109 (1921).
[20] Hibberd *v.* Edward, 235 Pa. 454, 84 Atl. 437 (1912); Hohl *v.* Modell (Pa.), 107 Atl. 885 (1919).